Crown Employees
Grievance Settlement Board

Suite 600
180 Dundas St. West
Toronto, Ontario M5G 1Z8
Tel. (416) 326-1388
Fax (416) 326-1396

Commission de règlement des griefs
des employés de la Couronne

Bureau 600
180, rue Dundas Ouest
Toronto (Ontario) M5G 1Z8
Tél. : (416) 326-1388
Téléc. : (416) 326-1396

Ontario

GSB#2002-2375, 2004-1217, 2005-2232, 2005-2768, 2006-0421
UNION#2002-0411-0038, 2004-0411-0071, 2005-0411-0080, 2005-0411-0081, 2006-0446-0001

IN THE MATTER OF AN ARBITRATION

Under

THE CROWN EMPLOYEES COLLECTIVE BARGAINING ACT

Before

THE GRIEVANCE SETTLEMENT BOARD

BETWEEN

Ontario Public Service Employees Union
(Ranger) **Union**

- and -

The Crown in Right of Ontario
(Ministry of Community Safety and Correctional Services) **Employer**

BEFORE	Deborah J.D. Leighton		**Vice-Chair**
FOR THE UNION	Donald Eady Paliare Roland Rosenberg Rothstein LLP Counsel	Jessica Latimer Paliare Roland Rosenberg Rothstein LLP Counsel	
FOR THE EMPLOYER	Sean Kearney Ministry of Government Services Legal Services Branch Counsel	Paul Meier Ministry of Government Services Legal Services Branch Counsel	
HEARING	November 30, December 15, 2010, February 8 & 11, June 15 & 20, July 20, 21 & 22, 2011		

Decision

Introduction

[1] The Board released a decision on the merits of Mr. Robert Ranger's grievances upholding both his complaints that he had suffered discrimination, harassment and a poisoned workplace at the Ottawa Carleton Detention Centre (OCDC) and that the employer had failed in its duty to accommodate him, when he became ill as result of the harassment and discrimination. The employer breached the *Human Rights Code,* R.S.O. 1990.c.H.19 (*Code*) and the collective agreement. In addition, the employer violated the Workplace Discrimination and Harassment Prevention Policy (WDHP). The Board made the following declarations:

1. The employer has violated Article 3.1 of the collective agreement because the grievor was harassed, suffered discrimination and a poisoned workplace on the basis of his sexual orientation and

2. The employer violated the WDHP Policy by failing to promptly investigate Mr. Ranger's WDHP complaint;

3. The employer has violated s.5 of the *Ontario Human Rights Code* by failing to provide for equal treatment of Mr. Ranger;

4. The employer has violated Article 3.1 of the collective agreement by failing to accommodate Mr. Ranger until shortly before he was offered a temporary position in January 2005.

As requested by the parties, I remain seized of all outstanding matters.

[2] The parties entered an agreement on November 12, 2010 (the "November Agreement") that outlined a procedure for dealing with the outstanding remedial issues and grievances to the date of this agreement. The November Agreement also provided that instead of tendering *viva voce* evidence on the issue of remedy, the parties would file statutory declarations and documents on consent with the Board to supplement the record on the merits of the case. I have

reviewed the declarations and the extensive documents most carefully. I will refer to them as needed to provide reasons for my decisions on the outstanding issues.

[3] There were three outstanding grievances identified in November 2010. Two were decided in interim decisions. The only remaining grievance is a complaint regarding Mr. Ranger's assignment to work as a Service Representative in the Ministry of Finance (MOF). Mr. Ranger objected to the MOF position in 2005 alleging that it was an unsuitable accommodation. I will address this grievance on the merits and remedy later in the decision.

[4] Shortly after the decision on the merits, the employer put Mr. Ranger back on the payroll and he returned to a position in Probation and Parole (P&P) on May 1, 2010. Initially the position was a desk job, but Mr. Ranger approached his supervisor when he learned that the counter position was available. This was the position that he did as a temporary accommodation in 2005. The employer is accommodating Mr. Ranger in this counter position, as a Rehabilitation Officer 2 in the Ottawa Court Intake Office. He is to continue at the same pay as a Correctional Officer (CO). The employer tailored the duties to the grievor's accommodation needs and with care to ensure a wide variety of duties. The evidence before me is that he is happy with this position. The parties formalized the agreement in Minutes of Settlement signed on September 14, 2010.

[5] The parties were also able to agree on the amount of Mr. Ranger's lost wages between 2002 and 2010 including shift premium and overtime. In a second, bottom line decision I addressed two outstanding issues with regard to lost wages. The union took the position that interest on the lost wages should be compound while the employer's view was that Article 22.18 of the collective agreement provides simple interest and must govern what interest is paid. I held

that the employer's view must prevail given Article 22.18 of the collective agreement provides simple interest.

[6] The union relied on *Latimer*, *infra*, to argue that I should order compound interest on Mr. Ranger's lost wages. The Board in the *Latimer*, ordered compound interest, but it appears from the decision that Article 22.18 was not argued to the Board. It may be that the parties in *Latimer* agreed to compound interest. It is just not clear. In any case, I decided that I could not follow *Latimer* because Article 22.14.6 provides that the Board has "no jurisdiction to alter, change, amend or enlarge any provision of the Collective Agreements." Thus, Mr. Ranger was entitled to interest on the lost wages as provided in Article 22.18.

[7] In the second issue before me the union submitted that the LTIP paid to the grievor between 2002 and 2010 should not be deducted from the amount of his lost wages. The union relied on tort and some wrongful dismissal cases to argue that the full amount of the grievor's wages should be paid to him. Counsel argued further that the employer was the wrongdoer here and should not get a discount on restoring the grievor's lost wages, by deducting the amount of the LTIP. The employer argued that the LTIP must be deducted because not to do so was contrary to the make whole purpose of compensation and would lead to a windfall payment. He said no Board or arbitrator has ever held that wages should be restored without deducting LTIP. He also argued that in effect the union was arguing for damages.

[8] Again, I agreed that the employer must prevail here. I was convinced that not deducting the LTIP from the damages for the lost wages was inconsistent with the principle of making the grievor whole or putting him in the position he would have been in "but for" the breach. I refer to cases on the 'make whole' principle later in the decision. I was satisfied that it would be inconsistent with the decisions of this board not to deduct LTIP payments from lost wages. The

Latimer case is an example where compensation for lost wages was awarded after accounting for LTIP payments.

[9] Having decided the two outstanding issues with regard to lost wages and LTIP payment in February 2011, I ordered that the employer pay the grievor $244,242.00.

Compensation

[10] The central issue before me in this decision is whether further compensation is owing to the grievor in all the circumstances of his case. The union seeks compensation in the following heads of damage:

1. General damages
2. Punitive damages
3. Aggravated damages
4. Pain and Suffering damages
5. Special damages for out of pocket expenses
6. Future wage loss compensation

[11] The union also seeks to have twenty-two weeks of vacation credited to the grievor, without the obligation to use the vacation time within a year of receiving it, and an apology from the employer.

Summary of the Union's Position

[12] Counsel for the union submitted that he had never seen a case before where a grievor had endured so much for such a long time. He submitted that given the nature of the evidence, the remedy must send a message that the Board will not tolerate behaviour that violates the *Code*, the collective agreement and the right to be free from discrimination and harassment in the

workplace. He contended that the employer claims to embrace diversity and require a discriminatory-free workplace, but it completely failed in its duty to the grievor. The employer failed to take appropriate and prompt steps to deal with the harassment and discrimination. None of what happened to Mr. Ranger should have happened.

[13] Moreover, counsel submitted that when Mr. Ranger became ill because of the discrimination and harassment and the employer failed to accommodate him in accordance with the *Code*, the collective agreement and their own policies. He emphasized the delay in accommodating the grievor for almost two years after he was well enough to return to work. In counsel's submission, the employer showed a callous disregard for the grievor's right to an accommodation. The effort to accommodate was negligent, incompetent and mired in senseless bureaucracy. All of this led to a victim being victimized again.

[14] In commenting on the employer's efforts to accommodate Mr. Ranger, he argued that it is not enough to prepare an employee profile, and run it through a computer to identify possible job matches. He submitted that the only thing that motivated the employer in the end to find a suitable job for Mr. Ranger was the decision on the merits. Although there were medical opinions that showed that the MOF position was not a suitable accommodation in 2008, the employer did not take meaningful steps to accommodate Mr. Ranger until the decision on the merits of this case.

[15] Counsel also submitted that connecting the duty to accommodate with the desire to settle the case was wrong and deserves censure from this Board. He argued that the employer needs to know that it must adhere to the duties under the *Code.* If the employer breaches its responsibilities, it will have to pay adequate, suitable compensation. Restoring wages and a job is not enough to make the grievor whole. This is for two reasons. The first is that it is not adequate

compensation for the grievor and the second is that no message is sent to the employer to change the way it operates.

[16] In sum, counsel argued that the facts in this case justify significant financial compensation, that I have the jurisdiction to award such compensation and that I should do so.

[17] Counsel for the union reviewed the evidence and my findings in the decision released in January of 2010. The hearing into the merits of Mr. Ranger's grievances took sixty-six days to hear over the course of approximately four and a half years. The *viva voce* and the documentary evidence was extensive.

[18] I will refer to union counsel's submission on evidence and the law pertaining to the damage claims in my decision. The union relied on the following cases in support of its argument: *Polymer Corp. v. Oil, Chemical & Atomic Workers* (1959), 10 L.A.C. 51(Laskin); *Imbleau v. Laskin* (1962), 33 D.L.R. (2d) 124 (SCC); *Ontario Liquor Boards Employees' Union (Fenech) and The Crown in Right of Ontario (Liquor Control Board of Ontario),* 2002 CanLII 45765 (ON GSB); *Ontario Public Service Employees Union (Tardiel et al) and The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services),* 2010 CanLII 81917 (ON GSB); *TOM Sawyer et al. and The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services),* 2006 CanLII 30737 (ON PSGB); *Firestone Steel Products of Canada and U.A.W., Local 27* (1974), 6 L.A.C. (2d) 18 (Weatherill); *Re Toronto Hydro – Electric System and C.U.P.E., Local 1* (1994), 43 L.A.C. (4th) 378 (Brunner); *Cheni Gold Mines Inc. and Tunnel & Rock Workers, Local 168 (1991), 22 L.A.C.* (4th) 1; *Cassandra Charlton and The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services),* 2007 CanLII 24192 (ON PSGB); *Nunavut and P.S.A.C.* (Kellett) (2006), 151 L.A.C. (4th) 35 (Knopf); *Hughes v. 1308581 Ontario*, 2009 HRTO 341 (CanLII); *Toronto Transit Commission v.*

Amalgamated Transit Union (Stina Grievance), [2004] OLAA No. 565 (Shime); *Ratneiya v. Daniel & Krumeh*, 2009 HRTO 1824; *Khan v. 820302 Ontario*, 2010 HRTO 265 (CanLII); *Ontario Public Service Employees Union (Latimer) and The Crown in Right of Ontario (Ministry of Community Safety and Correctional Services)* [2004] OGSBA No. 30; *Ontario Public Service Employees Union (Gibbon) and The Crown in Right of Ontario (Ministry of Correctional Services),* 2002 CanLII 45808; *Voris v. Insurance Corp. of British Columbia* (1985), 58 DLR (4th) 193; *Fidler v. Sun Life Assurance Company of Canada*, [2006] SCJ No. 30; *G. Morrison and The Crown in Right of Ontario (Human Rights Commission)* 1997 CanLII 10282 (ON PSGB); *Greater Toronto Airports Authority and Public Service Alliance Canada Local 0004*, 2011 ONSC 487 (CanLII); *Surrey (City) and C.U.P.E., Local 402*, [2003] BCCAAA No. 243; *Re Berryland Foods (Division of Jim Pattison Enterprises Ltd.) and UFCW, Local 430P* (1987) 29 L.A.C. (3d 311); *OPSEU (Meeks) and The Crown in Right of Ontario (Ministry of Natural Resources)* GSB No. 1429/88 (Feb. 20, 1991); *OPSEU (O'Brien) and The Crown in Right of Ontario (Ministry of Correctional Services)* GSB No. 1948/93 (Jul. 12, 1995); *OPSEU (O'Brien) and The Crown in Right of Ontario (Ministry of Correctional Services) GSB No. 1948/93 et al* (Nov. 14, 2000); *Honda Canada Inc. v. Keays*, [2008] 2 SCR 362, 2008 SCC 39; *Tipple v. Deputy Head (Department of Public Works and Government Services),* 2010 PSLRB 83; *McKinnon v. Ontario (Ministry of Correctional Services)* 2007 HRTO 4.

Summary of the Employer's Position

[19] Counsel for the employer submitted that the issue before me is what additional compensation should be ordered to make the grievor whole. He noted that the grievor has already received over two hundred and forty four thousand dollars in lost wages. Thus, the question is whether additional compensation is due, and if so, how much. The quantum must be based on

the law and my findings in the decision on the merits of the case. He contended that the case law shows that modest damages are awarded in similar cases to Mr. Ranger's.

[20] Counsel strongly disagreed with the union counsel's view that Mr. Ranger's case is deserving of a very large damage award because the Board must make it clear that it will not tolerate behaviour that violates the *Code*, the collective agreement and the right to be free from discrimination and harassment in the workplace. He argued further that the Ministry was not vile in its treatment of Mr. Ranger. If it had been, I would have concluded that and said so in my decision on the merits. Thus, while the union could argue large amounts of money in another case, it cannot do so here. There is no evidence of callous or extreme behaviour by the employer. There was no finding of bad faith. He submitted that the primary "culprits" were union members and that cannot be ignored.

[21] The employer submitted that it did attempt to accommodate Mr. Ranger and conceded that it did not go well at times but that at no time did the employer ignore its duty to accommodate Mr. Ranger. He submitted that the grievor had always received some form of compensation therefore there was no financial damage to the grievor. Thus, he argued Mr. Ranger is now in the position he would have been "but for" the breaches. He is in a job that meets his accommodation needs. The employer pays Mr. Ranger at the CO level and will do so as long as he works in his present position.

[22] Given there was no finding of bad faith by the Board, counsel argued there is no basis for punitive, aggravated, pain and suffering, mental distress or bad faith damages. The employer was not reckless or callous and it is only in the most exceptional circumstances that damages like these are awarded. He further submitted that the employer's liability is not absolute: in this case,

no manager harassed the grievor. Therefore, the employer is only liable for its own failings on the harm done.

[23] Counsel argued that I must objectively assess the impact of the breach of the *Code* on the grievor. He noted that the quantum sought by the union in this case has no connection to the facts of the case. He submitted that much of what has happened to the grievor could have been done better but that is not a basis for damages flowing from the breach of the *Code*. Further, providing a large sum of money will not fix the grievor's experience over the last ten years. In responding to the union's submission that I must send a clear message to the ministry he stated that the decision on the merits was a clear message, that, "one should not have to endure what the grievor endured at OCDC."

[24] Counsel responded to the union's criticism that the employer denied all liability for the discrimination and harassment, even when the Deputy Minister accepted the findings of the investigator that the harassment and discrimination did occur and that there was a poisoned workplace at OCDC. He submitted that this was a product of the nature of the adversarial process. Arguing further that once in litigation positions are often fixed and that in hindsight, it is easy to say someone should not have argued a particular position. He noted that it was a long hearing with many witnesses and complicated medical evidence.

[25] As I have indicated with regard to the union's submission, I will refer to counsel's submissions on the evidence and law pertinent to each claim in my decision. The employer relied on the following cases in support of its argument*: York Condominium Corp. No. 216 v. Dudnik (1991), 79 DLR (4th) 161 (Ont. Div. Ct.); Nova Scotia Construction Safety Assn v. Nova Scotia (Human Rights Commission), [2006] NSJ No. 210 (CA); OPSEU (Tilden) v. Ontario (Ministry of Municipal Affairs and Housing) (2000), GSB# 2109/95 et al.; City of Toronto (2002), 110 L.A.C.*

(4th) 129 (Starkman); OPSEU (Union Grievance re Tardiel et al.) v. Ontario (Ministry of Community Safety and Correctional Services) (2011), GSB#2005-1443; Smith v. Menzies Chrysler, 2009 HRTO 1936; Vancouver (City) v. Ward, [2010] 2 S.C.R. 28; McKinnon v. Ontario (Ministry of Correctional Services), [1998] OHRBID No. 10; LaFrance v. Treasury Board (Statistics Canada), [2009] CPSLRB No. 113; Hydro-Quebec v. Syndicat des employe-e-s de techniques professionelles et de bureau d'Hydro-Quebec, [2008] 2 SCR 561; OPSEU (Balog) v. Ontario (Ministry of Community, Family and Children's Services) (2004), GSB# 1998-1972; OPSEU (Kerna) v. Ontario (Human Rights Commission) (2005), GSB# 2002-0944, 2002-234; Eastwalsh Homes Ltd. V. Anatal Developments Ltd. (1993), 12 O.R. (3d) 675 (C.A.); OPSEU (Damani) v. Ontario (Ministry of Health) (2000), GSB# 1581/95, 1703/98; OPSEU (Sysiuk) v. Ontario (Ministry of Natural Resources) (1990), GSB# 1989-0195; Lavinskas v. Jacques Whitford & Associates Ltd., [2005] O.J. No. 4580 (Sup. Ct. J.); School District No. 36 (Surrey) (1999), 88 L.A.C. (4th) 445 (S. Kelleher); Thames Emergency Medical Services Inc. v. Ontario Public Service Employees' Union Local 147, [2006] OLAA No. 202(Knopf).

General Assessment of the Evidence

[26] Before addressing the parties' submissions on the law applicable to awarding damages in this matter I feel compelled to comment on the evidence on the merits of the case. The union takes the position that the case is extraordinary and deserves a very large damage award. In addition to compensation for lost wages, the union is seeking $3,589,106.00 in damages. The rational for the request of such significant damages is two-fold: it is in order to compensate the grievor adequately and to send a clear message to the employer to meet its duties under the *Code* and collective agreement.

[27] Counsel for the employer argued in contrast that Mr. Ranger's case was not particularly remarkable and therefore deserving of a small award of damages. He argued that based on the case law and the remedies that have already been provided to the grievor, the damages should be $10,000 for the harassment and discrimination and $7,500 for the failure to accommodate. He relied primarily upon my finding that the employer had not acted in bad faith when it mingled its duty to accommodate the grievor with its desire to settle the grievances. Counsel also emphasized that I must not ignore the fact that the "culprits" were union members.

[28] I am of the view that the facts as found in the decision on the merits speak for themselves. However, in assessing damages it is necessary and appropriate to comment and consider what actually happened to Mr. Ranger over the course of approximately ten years. As counsel for the employer rightly stated, no one should have had to endure what Mr. Ranger had to endure at OCDC. Moreover, he should not have had to endure what he did after he left OCDC.

[29] The harassment and discrimination that created a poisoned workplace at OCDC was vile. The chief culprit and his entourage taunted and humiliated Mr. Ranger repeatedly and the employer did almost nothing to address the homophobic atmosphere in the jail. The employer is liable for this failure. Arguing that the primary "culprits" were union members is true, however this does not absolve the employer's responsibility in knowingly doing nothing to address the poisoned workplace that Mr. Ranger and others had to tolerate. As I found in the decision on the merits, the chief culprit was a bully. People were afraid of him. The employer issued a three-day suspension to him after the WDHP investigator substantiated one of Mr. Ranger's complaints and found that OCDC was a poisoned workplace for gays and lesbians. That was the only evidence before me that the employer did anything about the poisoned workplace.

[30] There was extensive evidence before me that the harassment and discrimination made Mr. Ranger very ill. At times, he was suicidal. The most recent independent medical evidence put before me for the purposes of addressing the MOF grievance, indicates that Mr. Ranger is still suffering from depression and anxiety attacks and most likely always will. He is still on medication.

[31] In his statutory declaration, Mr. Ranger describes the impact of the harassment and discrimination that he endured at OCDC. He states that it has had a serious and lasting impact on his life. He describes suffering from "panic attacks, chest pain, nightmares, fluctuation in weight, poor eating habits, headaches, muscle pain, sleep disorders, stomach problems, lack of energy, memory and concentration problems, anxiety attacks and deep depression." He further describes himself as becoming an anti-social and isolated man. The impact of having to relive the harassment and discrimination during the hearing process was painful. His finances are in disarray. The whole experience has made him a bitter and angry man by his own words.

[32] The failure to accommodate Mr. Ranger when he was ready to return to work in April 2003 until January 2005 also adversely affected his health. In my decision on the merits, I held as follows:

> .....I must find the employer did almost nothing to effect an accommodation for Mr. Ranger between April 2004 and January 2005. Further, I cannot agree with the employer that it took all reasonable steps to accommodate Mr. Ranger until he was placed in the P&P position. The standard is to take reasonable steps until the point, where to go further, would cause undue hardship. As Vice chair Dissanayake noted in *Di Caro, supra,* if the employer takes the steps, the evidence of undue hardship will be clear. However, as noted earlier I heard no evidence that it would have caused the employer undue hardship to place the grievor in the bailiff position or to modify the ESRO position. There is no evidence before me relating to the factors s.17 (2) of the *Code* to prove undue hardship. The employer cannot ever merely assume that a job will not work as it did here.(Para. 135)

> …had the employer worked through the process of attempting to modify the duties of these jobs, Mr. Ranger might have still been employed by the ministry. And in the case of the ESRO he might have been able to return to work much sooner. He may not have suffered a relapse in his health. Dr. Lemay indicated that if he had returned to work before April 2004, he would not likely have had a relapse. (para. 136)

[33] In his statutory declaration, Mr. Ranger describes the impact of not getting the bailiff position: he was bitterly disappointed because the job would have allowed him to continue in a law enforcement career. Instead, the employer matched him to a permanent position outside the ministry in the MOF job. I am of the view that what Mr. Ranger endured at OCDC and as a result of the employer's breach of the duty to accommodate him caused great harm.

[34] Therefore, I disagree with the employer's submission that only modest damages are warranted. I agree with the union that significant damages are due but nowhere near the three and a half million dollars sought. Both counsel agreed that I must objectively assess the impact of the breaches and the harm suffered in deciding the appropriate damage award.

Damages

[35] There is no question that the Board has jurisdiction to award compensatory damages flowing from a breach of a collective agreement. *Polymer, supra,* subsequently upheld by the Supreme Court of Canada in 1962 established this. The jurisprudence of the Board makes it clear that it will award damages in appropriate cases: *Fenech, Tardiel, Sawyer, Latimer* and *Gibbon, supra*. In 1974 the Arbitrator in *Firestone, supra,* held that the central principle in assessing compensation where an employee has been wronged is to attempt to put the person in the position he or she would have been in without the wrong.

> The general rule relating to compensation in cases such as this is that the aggrieved person is to be placed, as nearly as possible, in the position he would have been in, had it not been for the wrong done to him. (para. 4)

It is generally referred to as the ‘make whole’ principle. In *Toronto Hydro-Electric System, supra,* the Arbitrator referred to the principle and stated that:

> The Employer is responsible for all resultant damage, which he ought to have foreseen or contemplated when the agreement was made as being not unlikely, or liable to result from the breach, or of which there was a serious possibility or real danger. (para. 3)

The Board in *Tardiel, supra,* adopted the ‘make whole’ principle*:*

> Compensatory damages are a non-taxable payment to an individual. They are designed to put the aggrieved individual in a position they would have been in, had the wrong not been committed. (para. 138)

[36] In *Toronto Hydro-Electric System, supra*, the Arbitrator went on to say that the employee must also take reasonable steps to mitigate losses and cannot claim for losses which could have been or ought to have been avoided. In *Fenech, supra,* the Board emphasized that there has to be a connection between the breach of the collective agreement and the loss. (p. 51) Thus, the damage award is to make the grievor whole but the claim must be foreseeable and not too remote.

[37] In *Charlton, supra,* the Public Service Grievance Board awarded damages to the complainant for racial harassment at Toronto Jail.

> The jurisdiction of this Board is to compensate the Grievor for damage to her dignitary interest as far as can be done by a monetary award. A monetary award that does not provide for the complete compensation for the full financial loss arising from the breach of such a fundamental term of the contract would fall well short of this remedial mandate. Put another way the Grievor’s dignitary interest is to be restored, she should not be financially worse off than if the racial harassment had not occurred. The Board, therefore, concludes that it does have the jurisdiction to compensate the Grievor for all financial losses that flowed from the workplace racial harassment that she suffered. (p. 11)

[38] In *Tardiel, supra* the Board awarded damages to a grievor who had also suffered from racial discrimination at the Toronto Jail over a number of years and who was a recipient of vicious hate mail threatening her death. The Board stated that:

> Human dignity is of fundamental value in a democratic society. Harassment and discrimination significantly impair an individual's dignity, as has manifestly occurred in this case … He deserves that the impact of the harm to his dignity be recognized in the damages awarded to him, albeit for the Employer's failure to take all reasonably necessary steps to prevent that harm. (para.139)

The Board in *Tardiel, supra,* also held:

> The grievor is entitled to compensatory damages for the Employer's contribution to the harm done to him, as described. The purpose is to meaningfully vindicate the rights of the grievor that were breached. The damages must be sufficient also to deter the Employer and others from future negligence, and to denounce the past negligence. (para.134)

[39] There is no precise formula for calculating damages to make a grievor whole. The Board in *Tardiel,* quoted from a human rights tribunal decision that emphasized this:

> Quantifying the impact of discriminatory treatment on a person is not a precise science. It is important not to set the quantum of damages too low even in less egregious cases. (para. 135)

[40] The Tribunal in *Kahn, supra,* went on to state that setting the damage award too low would tend to trivialise the importance of Human Rights. It is crucial not to create a 'license fee' to discriminate. (para. 100)

[41] In *Ratneiya, supra,* the Tribunal cited a Divisional Court decision that listed the criteria to consider when assessing damages for the injury to the Complainant's dignity, feelings and self-respect.

> The Ontario Division Court, in ADGA Group Consultants Inc. v. Lane, (2008) 295 D.L.R. (4th) 425 held that the following are among the factors that Tribunals should consider when awarding damages: humiliation, hurt feelings, the loss of self respect, dignity, and confidence; the experience of

> victimization; the vulnerability of the Complainant; and the seriousness of the offensive treatment.(para. 103)

[42] In assessing appropriate damages for Mr. Ranger, I must apply these fundamental principles in all the circumstances of the case.

Damages for the Breaches of the Human Rights Code

1) Harassment, Discrimination and Poisoned Workplace

[43] Union counsel argued that while it is well established that this Board has the jurisdiction to award damages and while the general principles are clear, their application to the facts can be a challenge. Counsel for the union argued further that the real question is what heads are appropriate and how much. Towards the end of his submission, he stated that no matter what I call the damages, the reason for them is to make Mr. Ranger whole. As noted earlier the union is seeking general, aggravated, punitive, special, pain and suffering and mental distress damages, and other remedies. The union withdrew the claim for bad faith damages during the submission on the law pertaining to remedy.

[44] Counsel for the employer argued that damages for the breaches of the grievor's human rights were appropriate but nothing else. In addition, as noted earlier he argued that they should be modest. Counsel argued that cases where a manager was responsible for the harassment were deserving of more compensation. He argued further that the cases where allegations of sexual harassment involving improper touching and reprisal as in the *Ratneiya* case, were much more serious breaches of the *Code*. In that case, the Tribunal ordered $25,000 in damages. In counsel's submission, $25,000 should be the absolute highest award made in this case.

[45] The union seeks damages for the harm to Mr. Ranger because of the discrimination and harassment and the poisoned workplace that the grievor had to endure at OCDC. Both counsel agreed that it was clear that damages for the two breaches of the grievor's human rights were appropriate. The only issue here is how much.

[46] I have already commented that the discrimination and harassment that Mr. Ranger endured at OCDC was vile. The employer was unable to prove due diligence in defence of the grievance. Therefore, it is responsible for the harm done to the grievor. The grievor has suffered much harm, as established clearly in the extensive medical opinions before me.
It is probably impossible to compare the harm caused by different kinds of harassment protected under the *Code.* However, to some extent that is what I have to do. Looking at recent awards made by the Board and the Human Rights Tribunal is some help. As noted earlier the law is clear that I must consider the nature of the breach and the extent of the harm to the victim in deciding what quantum is appropriate. (*Ratneiya, supra.)* This will vary, depending on all the circumstances of the case.

[47] *Tardiel, supra* is the most important case in my analysis because it is a recent Board decision awarding compensation for racial harassment. In *Tardiel,* the Board compensated the grievor for five specific incidents within a particular period. The award was $8,000.00 for specific incidents of racism and $15,000.00 for the anxiety and stress of being named in hate letters. The total was for $23,000.00 (not including special damages).

[48] I have decided that this approach is not helpful in the circumstances of Mr. Ranger's case. To put a value on every verbal taunt or vicious email that Mr. Ranger endured would be a Herculean task. He suffered the humiliation of harassment on an ongoing basis for just over a year until the "classroom incident" which led to his breaking point. I have decided to make a

comprehensive award here on all the circumstances of the harassment, discrimination and the poisoned workplace.

[49] There are several significant differences between the *Tardiel,* case and Mr. Ranger's. In *Tardiel,* the Board found that the employer was not diligent in addressing the poisoned workplace in the first period for which damages were awarded. During the second period, the Board found the employer was making good faith efforts to address the issues at the jail. There was room for improvement according to the Board, but the employer was trying. The Board said that in the second period the employer's "liability in negligence" for the letters was much reduced. (para. 148) In Mr. Ranger's case, the employer did virtually nothing to address the poisoned workplace at OCDC, except for one manager on one occasion. Managers knew what was going on and did nothing.

[50] The second significant difference is that the Board in *Tardiel* had no medical evidence to support the grievor's claim that it was the racism and hate letters that caused her loss of self-esteem and dignity and led to various health issues. The Board accepted the grievor's evidence that she suffered stress and anxiety.

[51] Mr. Ranger suffered much more harm. As noted earlier the medical evidence is uncontroverted that Mr. Ranger has suffered anxiety and deep depression, at times being suicidal. In assessing the injury to Mr. Ranger's dignity, feelings and self-respect I have reviewed the factors as summarized in *Ratneiya, supra*. It is clear from the evidence that the harassment at OCDC was profoundly humiliating to the grievor. Although he tried to ignore it, eventually it broke him. He felt victimized and lost self-respect. In his statement to the Board, he describes himself as transformed to a bitter, distrustful person. The harm he suffered was

foreseeable and he has clearly established the harm in the evidence. It would appear to be permanent.

[52] Mr. Ranger also lost the work that he wanted to do as a CO. The medical opinions are that he can never return to work in a correctional institution. He therefore lost opportunities to advance in his career. The employer's breach affected every aspect of both his professional and personal life.

[53] The impact of the employer's delay in investigating the grievor's WHDP complaint also affected the grievor adversely. There is almost no evidence to justify the considerable delay in investigating the grievor's complaint about the harassment and discrimination. I found in my decision on the merits that this delay was a breach of the employer's duty under the WDHP policy. There is ample medical evidence that shows that this delay made the grievor sicker.

[54] I have carefully considered the circumstances of this breach of the *Code* and collective agreement and the principle that the damage award here must attempt, so far as is possible, to restore the dignitary interest of the grievor in making my decision. There is no case before me where the complainant has suffered such extensive harm. Given the extent of the harm resulting from the employer's lack of diligence here, I have decided to award the grievor $45,000.00 for the breaches of the *Code* and the collective agreement.

[55] I recognize that this is a significant amount of compensation: it is the largest amount that this Board has ever awarded. However, I believe that it is in proportion to what other Boards and the Human Rights Tribunals have ordered since the *Code* was amended to remove a cap on human rights damages. Thus, this compensation is necessary in all the circumstances for the extensive damage to Mr. Ranger's dignitary interest.

2) Failure to accommodate April 2003- January 2005

[56] I am convinced that the employer's breach of its duty to accommodate Mr. Ranger from April 2003 to January 2005 also deserves significant compensatory damages. Union counsel argued that the employer's efforts to accommodate the grievor were mired in bureaucratic and negligent efforts to match him to a suitable position. Employer counsel argued that where the efforts may not have been the best, the employer did try. I tend to agree with the union's view here and that is why I found that the employer breached its duty to accommodate the grievor. The employer did not do enough in a consistent and concerted effort to find Mr. Ranger a suitable position. Thus, all that remains is to assess the compensation on the principles noted earlier in the decision and given the factors addressed below.

[57] A number of factors lead me to conclude that compensation here must be significant. The employer is responsible for the poisoned workplace at OCDC that made Mr. Ranger very ill. Mr. Ranger was off work from February 2002 to March 2005, although he was initially ready to return in March 2003. Manulife tried to work with the employer to return the grievor to a suitable job. The evidence of the Manulife consultant was that she had never seen an employer so reluctant to return an employee to work. Without repeating all the evidence from the merits, it is significant that there were long periods where nothing was done to find the grievor a position. There were two possible positions, but there was no attempt to modify either. This was very painful to the grievor. All of this led to a serious relapse in the grievor's health.

[58] The employer also tied the accommodation process to the litigation of the grievances. I did not agree with the union that this was done in bad faith, but it was badly done. There was clear evidence that one manager took the position that the grievor would not get an accommodation until he settled his harassment grievance. In the decision on the merits, I held

that the link between the litigation and the accommodation process delayed the search for a suitable position. This should not have happened.

[59] In considering the injury to his dignity, feelings and self-respect for the breach of the employer's duty to accommodate him, I have also reviewed the factors in *Ratneiya, supra*. There is no doubt on this record that the grievor felt victimized when he could not return to some kind of work. He was particularly vulnerable at this time for both health and financial reasons.

[60] In sum, it is for these reasons that I find this breach of the *Code* and the collective agreement so egregious. The breach did great harm. It was foreseeable and the medical evidence proves that it occurred. In fact, one of the employer's senior managers recognized in cross-examination that the employer knew that a delay in returning an employee can do great harm and may mean that the person can never return to work.

[61] I have decided to award $35,000.00 to compensate Mr. Ranger for the suffering and distress of the protracted effort and ultimate failure in April 2004, when the grievor became severely ill again. I am cognizant of this being a significant amount. It is not intended as a punishment to the employer. I am of the view that it is necessary in order to compensate the grievor adequately.

Loss of Spousal Relationship

[62] The union also seeks $100,000 in damages for the mental distress caused by the loss of Mr. Ranger's spousal relationship. The claim is for both the loss of companionship and financial support. Counsel argued that it was a foreseeable loss: the effect of the harassment and discrimination on Mr. Ranger was profound and interfered with all aspects of his life. It was not surprising that the spousal relationship broke down. Counsel relied on *Surrey, supra,* to argue

that the facts of the whole case support a claim for the tort of intentional infliction of mental distress. Counsel argued that the employer's behavior was flagrant and extreme, the harm was foreseeable and the conduct caused harm.

[63] Counsel for the employer argued that allegations of tortious conduct in the *Surrey* case were made on the merits of the case, not during the argument on remedy. He urged me to find that it was too late to argue this now. Further, he submitted that a finding of bad faith was essential to award damages for mental distress. Finally, the facts are also distinguishable in counsels' view because the grievor was terminated without cause and accused wrongly of being a sexual predator.

[64] I agree with the employer that it is too late in the hearing to be arguing that the facts before me support a finding of intentional infliction of mental distress. However, that does not preclude an award for damages for mental distress. Given the recent decisions in *Charlton* and the *Greater Toronto Airport Authority*, *supra*, I am not persuaded that there must be a finding of bad faith before an order may be made for damages for mental distress. The Board in *Charlton* actually found that the employer acted in good faith, but awarded damages for mental distress to the grievor who had been harassed because of her race. In *Greater Toronto Airport Authority*, the Divisional Court cited *Charlton* with approval and did not suggest that a finding of bad faith was necessary to order damages for mental distress:

> Generally, arbitrators have refused to award damages for mental distress. Those who have done so based their decision on the nature of the particular clause that had been breached and that led to the grievance. For example, the Public Service Grievance Board of Ontario awarded $20,000.00 in damages for mental distress where the grievor had been a victim of racial harassment, contrary to a contractual right to be free from racial discrimination. The Board held that such a term created an expectation of a psychological benefit, as it was meant to protect the dignity of an employee. Therefore, its breach would be expected to cause mental distress. Notably, the Board observed:

> Clearly not all terms and conditions of employment create the expectation of a "psychological benefit", and damages for mental distress are only available for breach of this type of contractual term.

[65] Observing that the law on damages for mental distress has changed and an independent actionable wrong is no longer required, the Court said that the test for these damages was clarified in *Fidler*:

> In 2006, in *Fidler*, the Supreme Court again dealt with mental distress damages, in a case where an insurer denied payment of benefits under a long-term disability insurance policy. No longer would it be necessary to show that there was an independent actionable wrong in order to obtain damages for mental distress for breach of contract (at para. 55). Instead, the Supreme Court adopted a principled approach to the award of damages for mental distress by asking what the particular contract promised. If one of the objects of a contract was to provide a particular psychological benefit, damages for mental distress would be recoverable if they were within the reasonable contemplation of the parties at the time the contract was made.(para 58)

[66] The Divisional court concluded that the arbitrator in *Greater Toronto Airport Authority* had the jurisdiction to award mental distress damages in the circumstances. Although the arbitrator did find that the employer acted in bad faith, the Court did not say that it was a requirement to make an award of damages for mental distress.

[67] The question to ask here is whether the collective agreement provides a particular psychological benefit. It clearly does. The benefit in the collective agreement is the right to be free from discrimination and harassment. The term of the collective agreement is intended to protect the dignity of the employee. The next question is whether the harm is foreseeable. In this claim the harm is loss of spousal support and companionship. The grievor’s statutory declaration describes the impact of the breaches on his personal relationships: he says he was depressed and difficult to live with. Nevertheless, I am not persuaded that damages for loss of spousal support

or companionship are a foreseeable loss in this case. Many factors may have lead to the loss here. I am convinced the claim is too remote and I must deny it.

Aggravated and Pain and Suffering Damages

[68] Counsel for the union also sought one million dollars under both of the heads of damages noted above. The claims under each head list the breaches of the *Code* and the collective agreement that I found on the merits and /or a catalogue of the impact of the harm done because of the breaches. The claim for aggravated damages also seeks compensation for knowingly ignoring the harassment that the grievor suffered at OCDC, for the employer's failure to investigate the grievor's harassment and discrimination complaint in a timely manner, and for arguing that the grievor was a liar in the proceedings. In his oral submission counsel for the union also argued that a three day suspension and a promotion of the chief culprit to a Deputy Superintendent in 2005 was aggravating to the grievor and sent the wrong message to others in the jail.

[69] The claim for damages for pain and suffering lists the effects of the breaches of the *Code* and collective agreement on Mr. Ranger. Humiliation, loss of self-worth, dignity and self-confidence all due to the harassment and discrimination are listed in the claim. The claims under this heading also include, *inter alia*, loss of sleep, nightmares, eating disorders, substance abuse, and ulcers. Also included are dependence on medication and psychological treatment. Loss of daily routine and reduction in quality of life are additional factors listed, as are the stress of financial difficulties and living with no mortgage insurance.

[70] Most of these claims are a result of the breaches of the *Code* and collective agreement for which I have already ordered compensation. I am of the view that to order further damages

under these heads would be to compensate for the same harm again, which would not be appropriate. Further, other things listed as justifying these damages are, not in my view, within my jurisdiction to remedy. For example, the fact that the main culprit was promoted in 2005 or that the employer alleged that Mr. Ranger was a liar during the hearing. Thus, I must deny the claim for aggravated and pain and suffering damages.

Punitive Damages

[71] The union seeks one million dollars in punitive damages for all that the griever has suffered over the years in the ministry and to send a strong message to the employer that when it acts as it has in this case, it will be held responsible. Counsel for the employer argued that punitive damages should not be awarded because the Board has no jurisdiction to order them. He also submitted that there are no findings to support such an award because there is no independent actionable wrong or harsh and vindictive behaviour by the employer. I have decided that even if I had the jurisdiction to award punitive damages, I would not do so in this case because the employer's behaviour was not malicious or outrageous. My analysis below indicates this is an essential element in making such an award.

[72] In *Gibbon, supra,* the Board held that it had no jurisdiction as a statutory board to order punitive damages. This has also been the view of many arbitrators. Recent decisions suggest that the Board does have jurisdiction in the appropriate case. In *Greater Toronto Airports Authority,* the Divisional Court held that the arbitrator could reasonably come to the conclusion that he had the power to award punitive damages. The court held:

> The arbitrator concluded that he had the jurisdiction to award punitive damages. While other arbitrators have been reluctant to find such jurisdiction, he could reasonably come to this conclusion given his broad remedial power under the *Code* and collective agreement. (para. 116)

[73] I am of the view that the Board has the power to order punitive damages under its broad remedial powers. However, for the reasons below I would not order them in this case.

[74] The Divisional Court reviewed the principles established by the Supreme Court cases on punitive damage awards in breach of contract cases. Punitive damages are exceptional in a breach of contract case. It is clear that there must be an independent actionable wrong. Even if an independent actionable wrong is established, the decision-maker should only award these damages when "the wrongdoer's misconduct is so outrageous as to require punitive damages for purposes of retribution, deterrence and denunciation." (para. 120) Finally, the Division Court said that the award of punitive damages must be rational and proportionate. The decision-maker must look at the "totality of the damages already awarded" and address the issue of why the compensatory damages are not enough to denounce the wrongdoing. (para. 126)

[75] The Supreme Court in *Keays*, *supra*, said, "punitive damages are restricted to advertent acts that are so malicious and outrageous that they are deserving of punishment on their own." (para. 62)

[76] The union argued that the breach of the WDHP was an independent actionable wrong. Alternately, the grievor could claim that the taunts and harassment were verbal assault. I am not persuaded that these are enough to establish an independent actionable wrong. In any case, I would not award punitive damages here.

[77] On the facts before me, I do not find that the employer's conduct was so malicious or outrageous as to require punitive damages. Further, I have made a significant award of compensatory damages, which I believe clearly denounces the breaches of the *Code* and collective agreement.

Special Damages

[78] By way of special damages, the union is seeking compensation for various financial losses arising from not being paid at full salary when Mr. Ranger was on sick leave or LTIP. The union claims cost with regard to mortgages, RRSP claims, credit and banking charge claims professional fees and extra expenses involving mileage costs. The union is also seeking reimbursement for prescription drug costs and for future coverage for prescription drugs until the age of 65.

[79] Further, there is a claim for future wage loss claims. This is based in the allegations that the grievor would have been promoted at some point to an OM16 were it not for the breaches of the *Code* and collective agreement. In the alternate, the union seeks that overtime and other premium pay that COs receive should be ordered. He also seeks clothing costs for the future. Having carefully reviewed the claims here and the extensive documentation, I have decided that all but one of these claims are too remote. As I indicated earlier in my decision, the grievor is entitled to be made whole for foreseeable damage. The grievor also has a duty to mitigate. In *The Greater Toronto Airport Authority*, *supra,* the Divisional Court approved the arbitrator's order for economic loss: The Court held:

> In determining the damages for economic loss the arbitrator relied on classic contract law principles governing the award of damages for breach, citing *Hadley v Baxendale* (1854), 9 EX.354,156 E.R. 145 and *Fidler, supra*. First, so far as is possible, damages for breach of contract should place the person seeking damages in the same position as if the contact had been performed. Second, damages should be awarded that fairly and reasonably arise from the breach or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made. (para. 91)

[80] Counsel for the union argued that it is foreseeable that someone living on a limited salary would incur costs on loans and suffer the consequences of cashing out RRSP's. He argued that

the actual losses including things like legal and accounting fees would not have been incurred if not for the breaches. He also argued that the future losses claim were foreseeable.
The counsel for the employer submitted that these claims are remote, speculative and therefore not merited. If the employer had acted in bad faith perhaps, they might be warranted. Here the employer had acted in good faith.

[81] I have already explained that while I was not prepared to find that the employer acted in bad faith by linking the ongoing litigation to its duty to accommodate, the connection delayed the process and caused Mr. Ranger much harm. Moreover, I found that the delay in investigating his WDHP complaint was a breach of that policy. So I agree with the union's reply argument that the finding of no bad faith does not mean that the employer acted in good faith. Moreover, there is no suggestion in *Tardiel, supra* that there must be a finding of bad faith before special damages can be ordered. The Board here did make orders for economic loss.

[82] As the Divisional Court in *Greater Toronto Airport Authority, supra,* states damages "should be awarded that fairly and reasonably arise from the breach or such as may reasonably be supposed to have been in the contemplation of the parties at the time the contract was made".

[83] Mr. Ranger took out a house improvement loan during the first period that he was away on sick leave. He testified that this was to give him a project to do. I accept that this was his motivation but it was not wise given he was on a reduced salary. As the Chair in *Charlton, supra,* said in denying a claim for dental costs, it was the grievor's choice to cancel her dental coverage. The Chair said the employer should not be expected to pay for what was an imprudent choice. The decision to borrow money for house improvement was an imprudent decision. Taking out a loan at a time that your salary is reduced is also inconsistent with the duty to mitigate losses. I have no real idea of how or whether the house improvement loan led to further

debt and the losses claimed for remortgaging and for credit card debt. Therefore, it is difficult to see how these losses flow from the breaches. Thus, I agree with the employer that the claims for mortgage costs, which include insurance and interest, other loans and interest on credit card debt, are too remote.

[84] This is also true for the RRSP claims, which the courts have consistently found to be too remote. The Board in *Tilden, supra,* reviewed the law on this question and held:

> I agree with the previous decisions that losses resulting from personal decisions with regard to RRSP or stocks are too remote and are not recoverable. As this Board has held in *Re Sysiuk,* the 'make whole' principle of remedy does not make such losses recoverable. (p. 18)

[85] It is also difficult to suppose that losses such as mileage costs to drive a partner to work and back could have been in the contemplation of the parties when the contract was executed. I believe that this is also true for mileage for visits to the doctor. These are also personal choices to incur an expense. I am also denying claims for past and future prescription costs. There are no receipts for the past costs and the future costs will be covered by the benefits under the collective agreement. The claim for future clothing costs is too remote and must be denied.

[86] Finally, I must also deny the claims for legal and accounting fees. As the Board in *Tardiel, supra,* said legal fees are in the nature of costs, and even if the Board had jurisdiction to award costs, he declined to do so. Nothing before me indicates that I have the power to order costs. Moreover, given the circumstances of this case, it would be inappropriate to order the employer to pay these fees. The grievor sought a legal opinion on an issue that was collateral to the case before me. The accounting fees are also a personal choice and too remote.

Damages for Future Wage Loss

[87] The union claims that Mr. Ranger should be compensated at the OM16 rate of pay until he retires. Counsel argued that the grievor ought to have been successful in a Competition for an OM position in the summer of 2001. Alternately, he argued that but for the harassment and discrimination that drove Mr. Ranger out of OCDC, he would have been promoted to an OM16 sometime between 2002 and 2010. Counsel for the union relies on the Divisional Court decision in *Greater Toronto Airport Authority*, *supra*, which upheld an award of damages for future economic loss. The court found that an award for future economic loss was within the remedial power of the arbitrator. The union also cited *McKinnon*, *supra*, as authority for ordering future wage loss. In that case, the Human Rights Tribunal ordered the employer to pay Mr. McKinnon at the OM16 rate.

[88] In the alternative, the union argued that Mr. Ranger should not have lost his career as a CO. He is receiving the salary of a CO but his pay should include shift premiums, statutory holidays, overtime and quarterly performance appraisals.

[89] Counsel for the employer submitted that it is too late for the grievor here to complain that he should have been promoted after a job competition in 2001. The competition was in July 2001 and the grievor learned that he was not successful in December 2001. He did not include this complaint in the harassment and discrimination grievance before the Board. Further, there is no evidence to suggest that the competition was unfair or the result discriminatory. Thus, in counsel's submission the *McKinnon* case is distinguishable.

[90] The argument that it is likely that the grievor would have been promoted to an OM should also be rejected, in employer counsel's submission. Citing the Tribunal in *McKinnon*, *supra*, he argued that the union must show that there was loss of an entitlement, not merely a loss

of an opportunity. In a claim for loss of opportunity, mere chance is not enough. The union must prove that, in this case, the job promotion was a "reasonable possibility."

[91] Union counsel argued in reply that the claim here is not the loss of a "chance." One of the key factors to be considered is whether the individual has done the job. Mr. Ranger performed in the acting OM16 position at management's invitation. Given his good work record, it is foreseeable that he would have been promoted sometime between 2002 and 2010. Relying on *McKinnon, supra,* he submitted the claim here does not rest on a finding of a discriminatory job competition; it is for the loss of the possible opportunity of promotion.

[92] In *McKinnon*, (2002) *supra*, the Tribunal was assessing, amongst other remedies, damages for loss of career opportunities because of the racial discrimination that the Complainant suffered at the Toronto East Detention Centre and the employer's subsequent non-compliance with the Board's orders. In the Tribunal's decision on the merits released in 1998, it found that the employer wrongly denied promotions to the complainant and his wife. The Tribunal found in 1998 clear evidence that their competition results had been falsified. Consequently, the Tribunal ordered promotions retroactive to 1989, and retroactive compensation.

[93] In the 2007 decision, the Tribunal was not deciding the issue of whether to place the McKinnons in the OM16 position, it was deciding what rank above the OM classification they might have achieved:

> But for having been illegally deprived of the promotions they won by way of Competition in 1989, the McKinnons would have become the equivalent of OM16s over seventeen years ago. They are clearly intelligent, competent and industrious people, and there is no telling how far they might have risen within the Ministry had their careers not been so flagrantly derailed. Ms. Hughes argues that, in determining what opportunities have been lost to them, the starting point should be the deliberate derailing of their careers, and that account should be taken of what might have

> transpired in terms of progress though the ranks over the last seventeen years. (para. 492)

[94] The Tribunal addressed the law it considered in deciding whether the McKinnons deserved damages for lost career opportunities was as follows:

> In the context of the relevant jurisprudence, a lost opportunity is something that was not certain to transpire: thus, whether an opportunity was lost is to a considerable extent speculative. The promotion of the McKinnons to the rank of OM16 is not something that *might* have transpired but for the wrong: it is not a matter of speculation the likelihood of which is to be determined on the basis of the legal principles and statistics to which the parties make reference. They succeeded in a competition the results of which were then falsified in order to deny promotions to which they were entitled. To steal away an entitlement is not to scuttle a *possible* opportunity that may or may not have materialized; and to restore what is rightfully theirs not to compensate the McKinnons for lost opportunities. (emphasis added by Tribunal, para. 493)

[95] The issue for the Tribunal was, first whether the McKinnons had not lost career opportunities. Then the question was what rank above the OM16 would they have achieved. The Tribunal was satisfied that the complainant and his wife would have been promoted to a rank senior to OM16. They had proved a reasonable possibility that they would be promoted beyond the OM16 rank. Therefore, they should be compensated appropriately.

The Tribunal held that it was necessary to consider lost opportunity damages as follows:

> To require that a party seeking damages for a lost opportunity show that something of real value was lost, but at the same time to recognize that that burden can be met by showing that there was a *reasonable possibility* that that opportunity would have produced the financial reward associated with it. (Emphasis added by the Tribunal, para. 497)

[96] Ultimately, the Tribunal found that it did not have enough evidence to make a decision as to what rank would have been achieved by the complainant “but for” the employer’s wrong doing:

> Whereas it seems likely to me that the McKinnons are entitled to damages for lost promotion and opportunities, the scope of those opportunities, the likelihood of success in realizing them, and the monetary value to be assigned

> to their loss, have not been made sufficiently clear to enable a conclusion to be reached at this time. (para. 508)

[97] I have carefully considered the arguments here. I am not persuaded that the evidence before me supports damages for lost career opportunities. The significant difference between the *McKinnon* decision and the facts before me are that the Tribunal had clear evidence that the employer deliberately derailed the McKinnons' careers by falsifying the competition results. Thus, in 1998 the Tribunal ordered the employer to place the McKinnons, retroactively in the OM16 position, with back pay. They were entitled to the OM16 positions: it was not merely a possibility that they would be promoted.

[98] The issue for the Tribunal in the 2007 decision was what rank they might have reached, but for the wrongdoing in the original breaches, but also because of the wrongdoing that continued after the decision when Tribunal orders were not implemented. There is no evidence before me that Mr. Ranger should have won a position as an OM16 in 2001 or that the employer deliberately derailed his career. Thus, it is difficult to conclude that he would certainly have been promoted to an OM16 at some point between 2002 and 2010. Not every CO is promoted to management, even some of the best. Thus, I must reject the union's claim here.

[99] However, I am persuaded that Mr. Ranger should be compensated at the CO rate, including overtime and premium pay, until he retires or achieves a promotion that pays more that the CO salary. "But for" the breach Mr. Ranger would be working as a CO and therefore he is entitled to the same pay as if he was doing the job. The employer has already agreed to maintain his salary at the CO rate of pay. He should also receive overtime and premium pay back to the date in 2010 when the employer stopped this part of his pay. It should be calculated in the same manner that it was for the time between 2002 and 2010. Further, this additional pay shall be paid until Mr. Ranger retires or achieves a promotion that takes him above the pay rate of a CO.

Vacation Credit Claim

[100] The union seeks an order to put twenty-two weeks of vacation in Mr. Ranger's bank. The grievor used vacation credits to top up sick leave pay. This is not a claim for vacation pay; it is for credits. Counsel argued that there was no time between 2002 and 2010 that would qualify as a vacation.

[101] Counsel for the employer argued that there was no foundation for the twenty-two weeks of vacation. The grievor is in a new job and entitlements should be those under the collective agreement. Thus, there is no remedial purpose for awarding vacation credits.

[102] In *Latimer, supra*, the Board ordered compensation the pain and suffering, loss of dignity and mental anguish for a grievor where it found that the employer was liable for harassment and discrimination contrary to Articles 3.1 and 3.2 of the collective agreement. The board also awarded vacation credits. The Board held that since the grievor was to be compensated for the difference between what she received on STSB and LTIP and her full salary, she had no financial loss for using the vacation credits. However, she had "lost the ability to realize the benefit of paid vacation time…" (p.10) The Board based the reasoning on the 'make whole' principle:

> …if her vacation credits are returned to her, she will be returned to the same position she would have been in had she not had to use them up, and therefore will be "made whole" in that regard. (p.10)

[103] Since at the time of the decision on remedy the grievor was still not able to return to work, the Board also ordered that the grievor would continue to accrue vacation annually without the obligation under Article 46.5 of the collective agreement to use the credits.

[104] The union here acknowledged that the claim for twenty-two weeks is an estimate of the credits used by the grievor and therefore lost for vacation purposes. I am persuaded that it is appropriate in the circumstances of this case to make an order for the actual credits used. Normally if a person used vacation credits to top up STSB or LTIP an order for the restoration of vacations credits would not be appropriate, but, as in the *Latimer* case, there are special circumstances here that justify the order. The harm that the grievor suffered was a result of the employer's failure to protect him from a poisoned workplace. He suffered further harm when the employer breached its duty to accommodate him. Thus, the actual vacation credits used by the grievor between February 2002 and January 2010 should be credited to his vacation bank. He is not obligated, as he is with the annual vacation credits, to use these credits within a particular period.

Apology

[105] The union seeks an apology for Mr. Ranger from the Deputy Minister, akin to the one Mr. Ranger received in 2004 when the DM accepted the findings of the investigator's report into the grievor's WDHP complaint alleging harassment, discrimination and a poisoned workplace. While some arbitrators have ordered employers to apologize, most of us believe that an apology ordered is not an apology. I find myself in the latter camp. I believe Mr. Ranger deserves an apology, but I decline to order one.

Ministry of Finance Grievance

Introduction

[106] The next matter for me to address is Mr. Ranger's grievance that the employer breached its duty to accommodate him when the employer assigned him to work as a Service Representative, OAG 11 in the MOF. The grievor reported for work on October 11, 2005 as

required and in his words decided to give the position his best efforts. Although he tried to learn the new job, he could not do it effectively. Despite training and assistance by the managers in MOF, he had numerous problems with the work. He asked co-workers for help and they tired of his constant questions. He felt alienated and like a failure. He went on a sick leave in March 2006. He returned to the Service Representative position in October 2006 to try again to learn the job and make it work for him. He became ill again in September 2007 and was away from work and on LTIP until January 2010, when the decision on the merits of his original grievance was released. Mr. Ranger also alleges that the employer failed to make adequate efforts to accommodate him in another position, when IME confirmed that the MOF position was not a suitable accommodation in May of 2008.

[107] As indicated earlier, the parties agreed (in the November Agreement) to put this matter before me. I heard no viva voce evidence. The record I have before me is an Agreed Statement of Facts, Statutory Declarations of the grievor and various management employees, and extensive documentation.

AGREED STATEMENT OF FACT

1. On or about May 31, 2005, Mr. Ranger achieved full-time hours as a result of a graduated return to work in his temporary assignment to the Probation & Parole office position.

2. On or about June 20, 2005, the Ministry of Community Safety and Correctional Services (the "Ministry") re-submitted a Request for Corporate Health Reassignment package on behalf of Mr. Ranger to Employment Programs and Services ("EP&S") unit.

3. On July 26, 2005, EP&S commenced the search process for full-time vacancies in all OPS Ministries for the purposes of locating a permanent assignment for Mr. Ranger. In accordance with EP&S' standard practice, EP&S went back three months from the date that the request for the reassignment was received (June 22, 2005) to March 22, 2005 to consider previously cleared vacancies.

4. EP&S examined positions that fell within:

a. Mr. Ranger's medical restrictions (as set out in the 20 June 2005 Request for Corporate Health Reassignment package and the medical restrictions therein);

b. EP&S' standard search salary parameters (within five per cent above and fifteen per cent below the maximum salary of Mr. Ranger's CO2 classification); and

c. Mr. Ranger's preferred geographic parameters (the Ottawa area).

5. For each of the applicable positions, EP&S reviewed the information contained in Mr. Ranger's Employee Portfolio against the Job Information Packages for the relevant positions.

6. In his Employee Portfolio, Mr. Ranger provided information about his skills, abilities, education and experience.

7. On or about August 12, 2005, EP&S received Competition FN006318 for clearance: Service Representative, OAG 11, Ministry of Finance, Gloucester.

8. On or about August 16, 2005, EP&S entered the Service Representative vacancy into the EP&S system.

9. In 2005, EP&S Match Reports were generated every Tuesday and Thursday.

10. On or about Thursday August 18, 2005, EP&S matched Mr. Ranger to the Service Representative position based on salary and his geographic preferences.

11. On or about August 31, 2005, Mr. Ranger provided EP&S with additional information about his skills and ability to interpret and apply legislation, policies, procedures and rulings. In his Employee Portfolio, Mr. Ranger had noted that he possessed advanced interpreting skills.

12. On or about September 8, 2005, EP&S finalized a Detail Skills Comparison between the Service Representative's "position skills" and Mr. Ranger's general skills, abilities, education and experience, as determined by his Employee Portfolio (including the skills and experience he acquired in the P&P position). EP&S made the "Decision to Match" and determined that Mr. Ranger had the necessary transferable skills.

13. On or about September 12, 2005, EP&S received confirmation from the Ministry of Finance that Mr. Ranger was minimally qualified to perform the Service Representative position.

14. On or about September 13 or 14, 2005, during a Grievance Settlement Board mediation held between the Employer and the Union in Ottawa, the Ministry of Finance Service Representative position was offered to Mr. Ranger as part of a full and final settlement of all outstanding matters as between the parties. At that mediation, Union counsel and Mr. Ranger rejected the Service Representative position on the grounds that, in their view, the job was not suitable.

15. From the first match report of July 26, 2005 (including three months back to March 22, 2005) to September 22, 2005, EP&S found no matches other than the Ministry of Finance Service Representative position.

16. On or about September 22, 2005, EP&S notified Mr. Ranger that he had "matched" to a full-time Service Representative position with the Ministry of Finance through the Employer's normal health reassignment process.

17. Specifically, in the September 22, 2005 letter, EP&S advised Mr. Ranger of the medical assignment to FN006318, Service Representative, OAG 11, Ministry of Finance, Gloucester and advised that his start date would be October 11, 2005.

18. On or about October 11, 2005, Mr. Ranger commenced working in the Service Representative position. Appropriate orientation and training (including "job shadowing") was offered to Mr. Ranger. The Ministry of Finance also provided Mr. Ranger with the appropriate tools (e.g. requisite manuals and e-learning tools).

[108] It is helpful to include a description of the Service Representative position before summarizing the submissions of the parties. The Position Description Report provides the purpose of the Service Representative as follows.

> -To enhance voluntary compliance and maximize revenues to the Province by providing information and compliance services to taxpayers, their legal/accounting representatives and the general public regarding programs/services administered by the Tax Revenue Division(TRD).
> -To register vendors and employers in accordance with the Retail Sales Act (RSTA) and Employer Health Tax Act (EHTA), ensure accuracy and completeness of the electronic taxroll systems, and provide customer service to taxpayers through response and resolution of enquiries.
> -To provide verbal interpretations by researching legislation, policies and precedents and referring unresolved issues to management.

The PDR identifies that the person in the position should have the following knowledge:

> Job requires specialized knowledge of the RSTA and service programs, procedures, regulations, operating policies, and reference manuals, good knowledge of TRD statutes (e.g. EHT, Bulk Sales Tax), as well as, general working knowledge of provincial, federal, and municipal programs (e.g. Business Licensing) to provide compliance services, identify and access RST liabilities existing prior to registration, answer inquiries regarding legislation, provide legislative interpretations, information on remittance requirements, rights/responsibilities, penalties/sanctions including procedural information, respond to account related inquiries, and maintain taxpayer accounts by accessing eligibility requirements for RST vendor registration advising applicants/clients and/or their representatives of their rights/obligations under

> the ACT, updating accounts/data base records with the information received from clients. Job requires knowledge of basic accounting to ensure compliance with RSTA and EHTA by calculation interest/penalties, reconciling returns, issuing debit/credit notices and/or refunds.

Union Submission

[109] Union counsel submitted that the only proper accommodation that Mr. Ranger was given was the P&P position where he began work in January 2005. He submits that this was a direct result of an interim order issued by the Board on October 6, 2004, ordering that the employer make best efforts to find a suitable accommodation and to put Mr. Ranger back on the payroll while a position was sought. Counsel also emphasized that the employer modified the job in 2005 to allow Mr. Ranger to do counter work, which he was good at and others did not like so much. In counsel's submission, this is virtually the same job Mr. Ranger is now in because of the decision on the merits and by agreement of the parties. He noted also that this position was available in 2004. Counsel emphasized that Mr. Ranger liked this work, was good at it and received accolades from coworkers who did not want him to go to the MOF job in October of 2005

[110] Union counsel argued that there is no evidence before me for why the grievor had to be moved to the MOF job. Counsel argued that the MOF job was not a suitable accommodation given the grievor's skills and abilities. The grievor felt like he was being set up to fail. The job was identified through a computer matching process: the grievor's employee portfolio and his medical restrictions were matched to available positions. There was no discussion with the grievor about the work. The employer did not consult the grievor's doctor. Counsel relies on a psychiatric opinion dated February 6, 2008 by Dr. B. Booth to support his submission that the position was not an appropriate accommodation and made the grievor ill. The opinion provides, in part, as follows:

> Further is my psychiatric opinion that Mr. Ranger is unable to return to his MOF position for the following reasons:
> a. The MOF position contributed significantly to Mr. Ranger developing his current depressive and anxiety symptoms.
> b. Mr. Ranger is very likely to have a relapse and worsening of his anxiety and depressive symptoms if he returns to the MOF position.
> c. Mr. Ranger is an individual who takes a great deal of his self-esteem and identity from his work. He reported that he cannot learn the tasks of the MOF, misses helping people and does not feel good about the job.

[111] Dr. Ahmed's opinion dated May 1, 2008 accords with Dr. Booth's assessment that Mr. Ranger could not return to the Service Representative position in MOF.

[112] After it was clear that Mr. Ranger could not do the MOF job, he remained away from work on full pay until LTIP was approved retroactively in October 2008 (to March 6, 2008) until the decision on the merits of his original grievances January 18, 2010.

[113] Counsel for the union argues that the employer did almost nothing to find an accommodation for Mr. Ranger after he left the MOF. After the employer received Dr. Booth's report, it began a job search for a position within the MOF and did not begin a government wide search until December 2008. EP&S Unit searches identified jobs but they were deemed unsuitable. The Regional Case Coordinator (Eastern Region) identified a possible temporary job in another ministry in December 2009, but nothing came of that. The Manager of HR Advisory Services for MGS declared that she received Mr. Ranger's file in April 2009 and thus became the designated contact with the EP&S Unit. She contacted Mr. Ranger to update his employer portfolio. She assured the Manulife representative that MGS was searching for job matches throughout --from December 2008 to January 2010.

[114] Counsel for the union argued that the employer's searches were a completely inadequate mechanical process that does not show a diligent approach to accommodation as required by law.

Thus, counsel submitted the grievor is right to say he was “left to rot” after leaving the MOF until the decision was released on the merits of his original grievances.

[115] Within three months of the decision, Mr. Ranger was back to work at P&P. The employer worked with the grievor to tailor the job to meet his accommodation needs. Thus, the union is seeking damages for the breach of the grievor’s human rights for the employer’s failure to accommodate to the point of undue hardship for 1) placing Mr. Ranger in the MOF position and 2) for the 2008- 2010 period.

Employer Submission

[116] Counsel for the employer argued that the employer has met its duty to accommodate Mr. Ranger since January 2005 when the grievor was provided work in P&P and then in MOF. The process of searching for suitable work may have been frustrating for the grievor but the employer was making efforts to find a good accommodation.

[117] Counsel for the employer submitted that the P&P job was never meant to be permanent. While the grievor clearly enjoyed the job, the exercise is to find a job that the employee can do, not necessarily what the grievor’s first choice would be. There was no *male fides* in assigning the MOF position to the grievor. Based on Mr. Ranger’s skills and the job, the employer decided that the MOF position was suitable. Counsel noted that the evidence before me of two management witnesses was that his health reassessment was consistent with minimal contact with correctional institutions. He argued that an accommodation does not have to be perfect; it just needs to be reasonable.

[118] Counsel submitted that the evidence before me is that while the grievor was in the MOF position MOF management supported him. The grievor says this in his statutory declaration. He

states that the managers tried to make him feel useful. The statutory declaration of one of the MOF managers says that the grievor did well at counter work and on the phone but he had problems "with the financial adjustment component" of the job. She arranged for further training on the *Retail Sale Tax Act* and on how Mr. Ranger could organize his work. The manager also met with the grievor regularly to address issues he was having.

[119] Counsel for the employer submitted that despite efforts of MOF the grievor went on STSB in April 2006. In August, the grievor agreed to attend a second IME with Dr. Ahmed who was of the view in September 2006 that the MOF job was not contrary to the grievor's medical restrictions. The grievor returned to the MOF position in September 2006. He stayed in the position until September 2007. Counsel argued that the employer satisfied the duty to accommodate the grievor between January 2005 and December 2008. Relying on *Balog, supra,* he argued that the employer is under no obligation to have the grievor's doctor review the new accommodation or to discuss the position with the grievor. The grievor has no right to choose his accommodation.

[120] In March 2008, the employer sought another IME from Dr. Ahmed, which they received on May 1, 2008. Counsel noted that the employer did not receive Dr. Booth's assessment, dated February 6, 2008 until April 11, 2008. Both psychiatrists opined that Mr. Ranger could not return to the MOF position.

[121] Counsel argued that searches from December 22, 2008 to May 10, 2010 show that no suitable positions were identified, contrary to the claim that nothing was being done to look for an accommodation. Counsel argued that the HR Manager's statutory declaration also proves the employer was trying through 2009 to get a match. He concluded that because the employer was unable to identify a position does not mean that it did not try.

[122] In sum, counsel argued that from 2005 on, the employer has satisfied is duty to accommodate Mr. Ranger. Any mistakes or shortcomings should not attract damages. Therefore, he urged me to dismiss the grievance.

Decision on the Ministry of Finance Grievance

1) The Assignment to the Service Representative Position

[123] I understand from Mr. Ranger's experience that he felt that he was being set up to fail when the employer assigned him to the MOF job in 2005. As it turned out, he was right that the job was not a good match. Although he had knowledge from his work in MCSCS of legislation, he had no knowledge of the *Retail Sales Tax Act.* Moreover, he was not mathematically inclined and this proved to be a huge problem as identified by the MOF management, who, even by the grievor's account, tried hard to support him in the new position. He had always hated deskwork and never would have sought this kind of work. It was also particularly painful for the grievor to have to leave his home ministry. He felt good in the P&P position. He was doing a good job and others appreciated his work.

[124] All this said, it is clear from the case law of the Board that the grievor has no right to pick his accommodation. In *Balog, supra,* the Board held that the employer is not obliged to discuss the position with the employee before reassigning the person to an accommodation. Further, there is no obligation to have the employee's doctor review the position, although it is often done to ensure that the medical restrictions have been adequately met. In this case, the medical restrictions were clear. Mr. Ranger could not work in any correctional facility.

[125] There is no evidence to support the suspicion that the employer was punishing him by assigning him to the MOF. Nor is there evidence of any improper motive in the assignment. During Mr. Ranger's first sick leave at MOF in 2006, the employer asked for another IME. Dr. Ahmed found that there were no medical restrictions to preclude the grievor from performing in the position. He recommended more training. To Mr. Ranger's credit, he returned to the job and tried again for about a year before becoming so ill that he had to leave work again.

[126] Two subsequent medical opinions done in 2008 found that Mr. Ranger could not return to the Service Representative position, but I am not persuaded that this supports a finding that it was a breach of the grievor's human rights to have assigned him to the position in the first place. Thus, I find that the employer did not fail in its duty to accommodate Mr. Ranger when it assigned him to the MOF position.

2) Accommodation Between 2008 and 2010

[127] Dr. Booth had made it clear that Mr. Ranger could not return to work at the MOF in an opinion received by the employer in April 2008. Dr. Booth also said that Mr. Ranger needed to work:

> If Mr. Ranger remains unemployed, he will likely remain with ongoing depression and anxiety. There is a possibility that this will worsen, as it has in the past. It may also make his likelihood for future employment less likely.

[128] When Manulife approved LTIP for Mr. Ranger on October 6, 2008 retroactively to March 6, 2008, they approved it "on the basis of total disability from performing the essential duties of his own occupation." Thus, he could not go back into the Service Representative position but with a suitable accommodation, he could go back to work, and indeed his health required it.

[129] Having carefully reviewed the documentation and statutory declarations on the issue of whether the employer failed to accommodate Mr. Ranger in the period between 2008 and 2010, I find there is insufficient evidence to support that the employer was diligent in trying to accommodate him. It is not enough to run a portfolio through a computer-matching program and then say jobs are not suitable. There is nothing in the record before me to show that the employer did anything to assess these matched positions. The employer identified a temporary position in the Ministry of Training Colleges and Universities in Ottawa but there is nothing before me as to what happened in the process after that. The onus here is on the employer to prove undue hardship and the record is simply not enough to show it.

[130] As I stated in the decision on the merits of the case if the employer takes the necessary steps to try to accommodate an employee, the evidence will be clear:

> In considering the evidence and the submissions of the parties, I must find that the employer did almost nothing to effect an accommodation for Mr. Ranger between April 2004 and January 2005. Further, I cannot agree with the employer that it took all reasonable steps to accommodate Mr. Ranger until he was placed in the P&P position. The standard is to take reasonable steps until the point, where to go further, would cause undue hardship. As Vice-chair Dissanayake noted in *Di Caro, supra*, if the employer takes the steps, the evidence of undue hardship will be clear. However, as noted earlier I heard no evidence that it would have caused the employer undue hardship to place the grievor in the bailiff position or to modify the ESRO position. There is no evidence before me relating to the factors in s. 17(2) of the *Code* to prove undue hardship. The employer cannot ever merely assume that a job will not work as it did here. (para. 135)

[131] The Manulife representative assigned to Mr. Ranger's case followed up periodically to see if the employer had identified any jobs. He sent an email on July 15, 2009 to the HR Manager assigned to Mr. Ranger's case. The HR Manager sent a query to EP&S, the MGS group running the computer searches. EP&S responded that they were continuing to search. Then said: "As stated in the email to Evelyn Wilson on December 19, 2008, unless you hear

from EP&S you may assume that we are continuing to search but have been unable to identify a position for the employee." This answer should have raised red flags: no one was attending to this case. That is what I have to conclude on the evidence before me.

[132] Thus, I find that the employer breached its duty to accommodate Mr. Ranger between April 2008 and January 2010 and grant this grievance in part.

[133] Now I must decide on an appropriate remedy. Based on the principles identified above Mr. Ranger deserves compensation for the harm done to him because of this breach of his human rights. He states in his statutory declaration that he felt as if the employer left him to rot. This was the second time that this had happened to him.

[134] Several medical opinions before me identify Mr. Ranger as a person who takes pride in doing a good job and needs to be productive. This was certainly the message in Dr. Booth's opinion received by the employer in 2008, quoted above. I have less of a sense of what Mr. Ranger suffered because of this breach in the duty to accommodate him than I did with the breach in 2003 -2005. However, at the end of the submissions on remedy I agreed to let Mr. Ranger read a statement about the impact of these breaches and the harm generally on him. The combination of the harassment, discrimination and not being accommodated for so many years have left him emotionally crippled. He is distrustful of everyone. The experience has completely crushed him. He said he wanted the employer to enforce its policies to prevent harassment and discrimination so no one else has to suffer what he has suffered.

[135] Given all the circumstances here, it is clear that the breach was significant and the harm extensive. I have decided to award $18,000 to compensate the grievor for the employer's failure to accommodate him between April 2008 and January 2010.

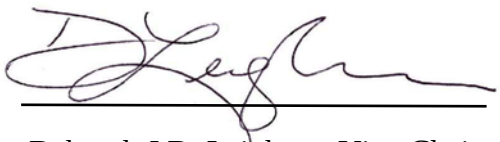
Order

[136] For the reasons above, I hereby make the following orders:

1) The employer shall pay the grievor $45,000 in compensatory damages forthwith, for the breach of the *Human Rights Code* and the collective agreement for the discrimination, harassment and poisoned workplace that he endured at OCDC;
2) The employer shall pay the grievor $35,000 in compensatory damages forthwith, for the breach of the *Human Rights Code* and the collective agreement for its failure to accommodate him between April 2003 and January 2005;
3) The employer shall pay the grievor $18,000 in compensatory damages forthwith, for the breach of the *Human Rights Code* and the collective agreement for its failure to accommodate him between April 2008 and January 2010;
4) The employer shall credit vacation credits used between February 2002 and January 2010 to the grievor's vacation bank forthwith, and the grievor is not bound to use these credits within a time limit;
5) The employer shall include overtime and other premium pay in the grievor's pay as long as he remains in his current position. The overtime and premium pay shall be calculated using the same method that the parties agreed to in deciding what was due to the grievor between 2002 -2010, and shall be paid retroactively to the date this compensation stopped in 2010. The employer shall pay these retroactive monies to the grievor forthwith.

[137] I shall remain seized of the implementation of this award.

Dated at Toronto this 24th day of July 2013.



Deborah J.D. Leighton, Vice-Chair